IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 559

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

A. E. STALEY MANUFACTURING COMPANY AND STALEY SALES CORPORATION

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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November, 1944.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Opinions Below.

The opinion of the Circuit Court of Appeals on the first hearing before it (R. 58-61) is reported in 135 F. (2d) 453. Its opinion on the second hearing (R. 100-116) is reported in 144 F. (2d) 221.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered July 6, 1944. (R. 116.) The petition for writ of certiorari was filed October 6, 1944. Notice of filing the petition for writ of certiorari was served upon Respondents October 23, 1944. The jurisdiction of this Court is invoked under Section 11 of the Clayton Act, 32 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code, as amended.

Question Presented.

Where Respondents' prices were delivered prices determined to meet the prices of competitors, were the prices charged by Respondents made in good faith to meet an equally low price of a competitor?

Statute Involved.

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides:

> (a) It shall be unlawful for any person engaged in commerce * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. * * *
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, that nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. * * *
>
> (f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Statement.

The Federal Trade Commission filed a complaint against Respondents under Section 11 of the Clayton Act as amended charging Respondents with violating Section 2 of that Act as amended. The case was heard on stipulated facts. (R. 15-35.) After the Commission had made findings of fact (R. 35-46) and had entered a cease and desist order (R. 46-48) the Court below, on a petition to review the order, held that the Commission had failed to make a finding covering the essential elements of the cause of action and that there was no evidence to prove in what respect the acts of price discrimination substantially lessen competition or promote monopoly and remanded the case to the Commission for further findings and for further hearing if necessary (R. 58-61).

The Commission held no further hearings, but made and filed in the Court below modified findings as to the facts. (R. 66-92.) In the language of the Court below, the modified findings were for the most part twenty-seven pages of argumentative dissertations in support of the Commission's thesis. The so-called findings of fact had to be sifted to find what the facts found were. (R. 101.)

The Statement in the petition of the Federal Trade Commission refers only to the modified findings of fact and not to the evidence. Some of the references are incomplete or inaccurate. In outlining the facts, we will refer only to the stipulated evidence.

Respondents first manufactured corn syrup in 1920. Syrup manufactured by competitors was being sold at delivered prices in various markets. Two large manufacturers manufacturing corn syrup were located in Chicago and were selling corn syrup in Chicago at prices lower than the prices in any other market. The prices of these com-

petitors in other markets were generally equal to the Chicago delivered price plus the published freight rate from Chicago to destination. (R. 23-24.)

The syrup manufactured by Respondents was not known and Respondents found that buyers were unwilling to pay as much for their corn syrup as for corn syrups with which the buyers were familiar. Respondents' early sales were made by making whatever price reduction was necessary to obtain business. After a short time, Respondents found their corn syrup was well received and that they could sell at the same prices that their competitors were selling. Accordingly, Respondents then adopted the practice of selling at the same delivered prices as their competitors, whatever that might be. (R. 24.)

Respondents have sold corn syrup at the same delivered prices as were quoted by competitors in the markets and at the destinations set forth in Commission's Exhibit No. 1. (R. 24, 31.) No charge was made in the complaint, and there was no evidence of any kind proving or tending to prove, that any such sales were made by Respondents pursuant to any agreement or understanding, express or implied, with any of their competitors.

On several occasions since June 19, 1936, Respondents have increased and reduced their price per hundred weight for corn syrup for delivery in all markets by the same amount per hundred weight without and independent of any similar and prior action by competitors. (R. 29-30.)

The quality of corn syrup manufactured by Respondents and their various competitors is substantially the same. Respondents in no instance have been able to obtain a premium over the general market price charged by competitors, and competitors are not able to obtain a higher market price at any point than that quoted by Respondents in such market. (R. 24-25.)

Corn syrup is used to some extent in the manufacture of candy, constituting from 5 to 30% of the finished weight thereof. Generally corn syrup is used in candies sold by candy manufacturers at a few cents per pound and at narrow margins of profit. Candy manufacturers may attract customers by selling such candies at as little as one-eighth of a cent per pound lower than competitors. (R. 18.)

The higher prices paid for such corn syrup by candy manufacturers located other than in Chicago contribute to a greater or lesser degree in their having higher raw material costs than those manufacturers located in Chicago. (R. 18.)

Candy manufacturers paying higher prices for corn syrup may sell candies at competitive prices only by absorbing the higher syrup costs or by increasing the price of candies. The result in either case is to reduce profit either directly through the absorption of such higher syrup costs or indirectly through reduced volumes of sales. (R. 18.)

The lower profits of candy manufacturers paying higher prices for such syrups diminishes their incentive or desire to compete with those candy manufacturers paying the lower prices for such syrup and may deter potential new candy manufacturers from entering the industry where they would pay the higher sales costs. (R. 18.)

A similar situation exists with reference to syrup mixers. Table syrup is packed sixty pounds to a case, of which approximately fifty pounds is corn syrup. Syrup mixers may attract customers by selling such mixed syrups at five cents per case lower than a competitor. (R. 19.)

Prior to the time Respondents began the manufacture of corn syrup, certain selling methods known as "booking practices" were in existence in the industry. Respondents did not originate or adopt these methods, but they have

met the competition of others where necessary to retain their customers and their business. (R. 27-28.)

The "booking practices" grew out of a long established trade practice in the industry by which, after a price advance, all purchasers of corn syrup have been permitted to purchase at the old price for a specified period of time following the announcement of the price advance. Competitors of Respondents have discriminated between purchasers by extending this period of time to certain purchasers and not to others, and by other similar practices by which certain purchasers of corn syrup have been able to purchase corn syrup at lower prices than other purchasers. (R. 25-29.) The Respondents engaged in the "booking practices" in order to retain their customers and their business. (R. 28.) Respondents engaged in the "booking practices" because they believed the statements of customers that such customers were receiving similar concessions from competitors of Respondents. (R. 28, 29.)

The Court below held that the prima facie case made out by the Commission was rebutted by the showing made by Respondents that the discriminations were in good faith to meet an equally low price of a competitor. (R. 104, 106, 110.)

Argument.

1. The Court below correctly vacated the order of the Federal Trade Commission. The evidence was stipulated and the undisputed facts clearly disclose that the prices of Respondents were delivered prices determined to meet the prices of Respondents' competitors in the various markets. Under Section 2 (b) of the Clayton Act this proof constitutes a sufficient defense to the complaint of the Federal Trade Commission. The question of whether or not the prices of Respondents were made in good faith to meet

the equally low prices of competitors is the only question involved in this case. Contrary to the statement of the Commission in its petition, the question of the legality of the basing point pricing system is not at issue. The Court below in its opinion specifically stated "We do not find it necessary to decide whether or not the so-called basing point system is legal or illegal." (R. 104.)

2. There is nothing "inherently discriminatory" in the basing point pricing system. Obviously a Chicago manufacturer has the right to charge his customers his Chicago price plus freight to destination. When he does that, he is using the basing point pricing system and it cannot be contended that any discrimination could possibly result. If a competitor of the Chicago manufacturer is located in some other city, Decatur, Illinois, for example, his plant price plus freight to destination might be higher or lower than the Chicago manufacturer's price at some or all destinations. Where it is higher, the Decatur manufacturer is certainly entitled under Section 2 (b) of the Act to meet the lower price of the Chicago manufacturer. That is what Respondents did in this case. The evidence is uncontradicted. By adding to the Decatur price for corn syrup shown on Commission's Exhibit No. 1 (R. 31), the freight from Decatur to destination as shown on Respondents' Exhibits No. 1A and 1B (R. 33, 34), it clearly appears that the resulting price in each instance is higher than the prices at which the actual sales were made. By meeting the lower price of their competitors', Respondents were doing only what they were entitled to do under the law.

3. The cases cited at Page 12 of the petition are not in point. They do not involve a provision similar to the section of the Statute here involved. Section 3 of the Clayton Act, Section 5 of the Federal Trade Commission Act and the Sherman Act are not qualified by a provision that a

seller may rebut the "prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by competitor".

4. Likewise, the cases of *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73, and *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63, are not in point. In the Algoma Lumber Co. case, there was substantial evidence in the record supporting the charge of unfair competition and it was upon such substantial evidence that the Federal Trade Commission based its order. In the Paper Trade Association case, this Court held that in determining the effect of certain stipulated facts, the Federal Trade Commission was entitled to take into consideration all of the stipulated facts and the inferences legitimately to be drawn from them.

In the case at bar the only evidence is the stipulation that Respondents determined their prices by meeting the competition of their competitors. There is no contrary evidence nor are there any inferences to be drawn. The evidence was all stipulated and it is not contradictory. There was no evidence to be weighed by the Federal Trade Commission. The Court below simply applied the law to undisputed facts as the Federal Trade Commission had arbitrarily and unreasonably refused to do.

5. The question of whether or not Respondents were entitled to rely upon verbal statements of customers is not involved. Section 2 (b) of the Act simply requires that the action of a seller be in good faith. Again on this point, the evidence is without contradiction. Respondents, believing the statements of their customers (R. 28-29), met the competition of others to retain their customers and their business (R. 27-28). It does not require an inference

to determine that Respondents were in good faith if they believed the statements made to them. Furthermore, persons are presumed to obey the law. Section 2 (f) of the Act makes it unlawful for a buyer to knowingly induce or receive a prohibited discrimination. The record affirmatively shows good faith on the part of Respondents, but were not such evidence available, we submit that Respondents were entitled to presume that their customers would not violate this section of the Act, and upon such presumption were justified in believing the statements made to them by their customers.

6. The case of *Corn Products Refining Co.* v. *Federal Trade Commission*, 144 Fed. 211, referred to at Pages 9 and 12 of the petition has no bearing on this case. The Court below said, "While both cases agree that the pricing under the basing point and booking practices was discriminatory, the companies in the present case present a defense not considered in the Corn Products Refining Co. case". Likewise, in the Corn Products Refining Co. case, the Court referred to the decision of the Court below in this case and said, "The final disposition of that case grew out of the belief of the court that the manufacturer was, under the facts there involved, justified in what it did in the proviso of the Statute exempting the vendor from liability if it proves that the practice complained of is necessary, in good faith, to meet the lower prices of competitors. In other words, the facts were such, in the belief of the majority, as to rebut, as provided by the Act, the prima facie case of violation made by the Commission. No such question is presented to us here, for the present record discloses no such contention and no such rebutting facts."

Conclusion.

Respondents are given no rights or advantage by the decision of the Court below. Under the decision and under the law, they were and are entitled in good faith to meet the equally low price of a competitor.

This case presents no question which requires a review by this Court. The petition should be denied.

Respectfully submitted,

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November, 1944.